Filed 9/30/03 In re Angela L. CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re ANGELA L., a Person Coming Under the Juvenile Court Law.	
SONOMA COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. BRIAN L., Defendant and Appellant.	A101072 (Sonoma County Super. Ct. No. 1135DEP)

The juvenile court terminated the parental rights of appellant Brian L. to minor Angela L. and chose adoption as her permanent plan. On appeal, Brian contends that the juvenile court erred by failing to comply with the notice provisions of the Indian Child Welfare Act (ICWA). (See 25 U.S.C. §§ 1901-1963.) We affirm the juvenile court order.

I. FACTS

In June 1993, Angela L. was born to Carlisa R.[1] Brian L.[2] is presumed to be

[1] As Carlisa has not appealed the juvenile court's order terminating her parental rights, we include information about her only insofar as it relates to the issues that Brian raises in his appeal.

Angela's father. On August 29, 2000, when Angela was seven years old, officials found her baby sister to be ill because she had tested positive for cocaine and opiates. Her mother Carlisa denied breast-feeding the infant, but could offer no explanation how she could have been exposed to drugs. The infant and Angela were both removed from Carlisa's custody and detained by authorities. On August 31, 2000, respondent Sonoma County Human Services Department petitioned the juvenile court to have Angela declared a dependent child on grounds of sibling abuse. (See Welf. & Inst. Code,[3] § 300, subd. (j).) At a September 1, 2000 detention hearing, Angela was ordered to be returned to Carlisa.

During three tests in early September 2000, Carlisa had twice tested positive for alcohol, methamphetamine, and marijuana. On September 20, 2000, the department filed an amended petition seeking to have Angela declared a dependent of the juvenile court. The petition alleged sibling abuse and a failure to protect because of Carlisa's drug and alcohol abuse. It specifically alleged that Carlisa had failed to ensure that Angela regularly attended school or obtained necessary dental care. (See § 300, subds. (b), (j).) This time, Angela was not detained, but remained in Carlisa's care.

On September 25, 2000, the social worker prepared a report for the juvenile court citing Brian's history of physical assault and child molestation. He was a convicted child molester who admitted molesting two girls. The report also noted that a restraining order in effect until March 2001 precluded him from having unsupervised contact with Angela. He had not seen Angela for over a year, but wanted to visit with her. The department recommended that Brian not be offered reunification services.

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[2] Brian is the father of two or three other children, one of whom was adopted in 1995 after he and the child's mother failed to successfully complete family reunification.

[3] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

On September 27, 2000, Brian first appeared in juvenile court. In October 2000, the juvenile court found that amended allegations of the amended petition pertaining to Carlisa were true. Brian contested jurisdiction and issues relating to him were continued.

Carlisa continued to test positive for drugs and alcohol or to refuse to test. On November 1, 2000, Carlisa failed to pick Angela up from school at the end of the day. On November 3, 2000, a social worker met with Carlisa to discuss her case with her. Carlisa appeared to be under the influence of alcohol or drugs. When the social worker saw Angela, she was infested with lice. She was detained and placed in a shelter. On November 7, 2000, the department filed a supplemental petition, seeking to place Angela in foster care. (See § 387.) On November 8, 2000, the juvenile court ordered that Angela be detained because Carlisa had no means of supporting the minor and because her substance abuse prevented her from caring for the minor.

On November 17, 2000, the juvenile court denied the department's request to deny services to Brian and instead ordered him to comply with a reunification plan that included supervised visitation. In a December 2000 report, the social worker noted that Brian had regular supervised visits with Angela, but that he had questioned the minor in a manner suggesting that he was trying to learn the location of her foster home. He also asked inappropriate questions about their relationship. A fost-adopt home had been identified for Angela and she was visiting the home in anticipation of an upcoming move there. On December 13, 2000, the juvenile court found the allegations of the supplemental petition to be true. (See § 387.)

In February 2001, Angela was identified as an adoptable child. During his visits with Angela at this time, Brian frightened the minor and upset her by telling her that she would never see Carlisa again if she were adopted. His conduct during visits was found to be inappropriate—he failed to take the suggestions of those supervising the visits and did not take the minor's wishes into consideration. Angela's therapist reported that the child wants Brian to "disappear" and was angry

when she visited with him. By early March 2001, the social worker—concerned that Angela was being forced to visit with a virtual stranger—suspended visitation until Angela's counseling had progressed.

On March 7, 2001, the department filed a petition for modification, seeking to suspend visitation between Brian and Angela. (See § 388.) On March 13, 2001, a juvenile court judge enjoined him from contacting his former social worker through March 29, 2001. Brian opposed the proposed modification and denied that he was stalking his social worker. On March 29, 2001, the injunction against contacting Brian's social worker was extended for three years. The juvenile court also suspended his visitation with Angela. Brian moved for reconsideration of this order in June 2001.

In May 2001, a second social worker sought a similar restraining order, noting that Brian had threatened violence. He declared to the court that Brian had made hostile and harassing telephone calls and left similar messages about his visitation with Angela. There were also reports that Brian had telephoned other department officials at home. A temporary restraining order issued to prevent Brian from contacting his second social worker on May 22, 2001. On June 20, 2001, Brian stipulated to a restraining order and the juvenile court ordered him to keep away from his second social worker for three years.

At a February 2002 twelve-month review hearing, the juvenile court found that Brian had voluntarily absented himself from the proceeding. In March 2002, the juvenile court rejected Brian's claim that reasonable services had not been provided to him because the department was biased against him; because his counseling needs had not been addressed; and because the department would not pay for a second evaluation of him after Brian was suspended from a program. It concluded that Brian's participation in reunification services had been minimal, at best. It found that he failed to participate regularly in court-ordered treatment and had not made substantive progress in those programs he did attend. This failure was found to be prima facie evidence that giving custody of Angela to him would be detrimental to

her. There was little, if any, likelihood that continued reunification services would result in her return to him. Thus, the juvenile court terminated Brian's reunification services.

In October 2002, the juvenile court conducted its permanency planning hearing. It concluded that it was likely that Angela would be adopted. Brian argued that despite this finding, termination of his parental rights would be detrimental to her because he maintained regular visitation with her and she would benefit from a continuing relationship with him. (See § 366.26, subd. (c)(1)(A).) The trial court disagreed, finding instead that his visitation with Angela had been curtailed because she did not want to see him. Their relationship was negative, not positive. The juvenile court terminated Brian's parental rights, having found by clear and convincing evidence that this would not be detrimental to Angela.

II. THE ICWA

A. *Notice Requirements*

In his sole claim of error on appeal from the order terminating his parental rights, Brian contends that the court erred by failing to comply with the notice provisions of the ICWA. He argues that the juvenile court did not ensure that the required notice was given; that this constituted prejudicial error; and that it failed to make a required finding of compliance with the notice provisions and ICWA application.

By adopting the ICWA, Congress intended to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of these children in homes that reflect the unique culture of Indian tribes. Under its terms, the termination of parental rights to an Indian child are subject to special federal procedures. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 734.) One safeguard requires the department urging termination of parental rights to notify inter alia the Indian child's tribe of the pending proceeding. If the identity or location of the Indian tribe cannot be determined, then notice must be given to the United States Secretary of the Interior.

Proceedings to terminate parental rights may not be conducted until at least 10 days after that notice was received by the tribe or the Secretary of the Interior. (25 U.S.C. § 1912(a); *In re Marinna J., supra,* 90 Cal.App.4th at pp. 734-735.)

The child's Indian status need not be certain before notice is required. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.) If the juvenile court has reason to believe that a child may be an Indian child, notice must be given to the tribe by filing the petition by registered mail with return receipt requested. (*In re Desiree F., supra,* 83 Cal.App.4th at p. 471; *In re Kahlen W., supra,* 233 Cal.App.3d at pp. 1421-1422; see 25 U.S.C. § 1912(a).) It is not sufficient for the tribe to be merely aware of the proceedings. Actual notice to the tribe of the proceedings and of its right to intervene is essential to ensure that the tribe will be afforded an opportunity to assert its rights under the ICWA. (*In re Marinna J., supra,* 90 Cal.App.4th at p. 735; *In re Kahlen W., supra,* 233 Cal.App.3d at pp. 1421-1422.) The tribe has the exclusive right to determine whether a child is a tribal member or is eligible to be one. (*In re Desiree F., supra,* 83 Cal.App.4th at p. 470; see Cal. Rules of Court, rule 1439(g)(1).) The ICWA's notice provisions are broadly interpreted and strictly construed. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1407; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) With these general considerations in mind, we turn to the legal arguments presented in this appeal.

B. *Father's Failure to Object*

Preliminarily, the department argues that by failing to object that ICWA notice was deficient in the juvenile court, Brian has waived his right to assert this on appeal. Brian actively participated in many juvenile court hearings that he attended, but neither he nor his attorney raised an ICWA notice issue. A few appellate decisions suggest that a parent's failure to object to ICWA notice compliance constitutes a waiver of this issue on appeal. (See *In re Pedro N.* (1995) 35 Cal.App.4th 183, 190 [untimely objection raised]; *In re Riva M.* (1991) 235 Cal.App.3d 403, 412.) However, more recent decisions have rejected the application of a waiver rule in

ICWA notice cases. In these rulings, appellate courts reason that because the ICWA's notice requirements are intended to protect *tribal* interests, they cannot by waived by a *parent's* failure to object on this ground in juvenile court.[4] (*In re Antoinette S., supra,* 104 Cal.App.4th at p. 1408; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259-261; *In re Samuel P., supra,* 99 Cal.App.4th at pp. 1267-1268; *In re Marinna J., supra,* 90 Cal.App.4th at pp. 733, 738-739; *In re Desiree F., supra,* 83 Cal.App.4th at p. 471; *In re Kahlen W., supra,* 233 Cal.App.3d at p. 1425.) As this reasoning is consistent with the purposes of the ICWA notice requirements, we conclude that Brian's failure to object on this ground in juvenile court proceedings did not constitute a waiver of this issue on appeal.

C. *Compliance with Notice Requirements*

1. *By Department*

On appeal, Brian contends that the ICWA notice provisions were not satisfied because the department offered no proof that it sent proper notice. In its September 2000 report, the department noted that Carlisa had identified herself as Native American. She was not an enrolled member of a tribe, but her maternal grandmother was enrolled in the Cherokee Nation of Oklahoma. The social worker advised the court that the case did not appear to fall within the ICWA because Carlisa was not enrolled and Angela did not appear to be an Indian child.[5] The social worker reported that she sent notice of the proceedings and requests for confirmation of Indian status to the Bureau of Indian Affairs (BIA) and the Cherokee Tribes. She

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[4] One court has held that because the ICWA is based on the premise that it is in the Indian child's best interests not to separated from the tribe, the minor has an independent right to be protected regardless of any parent inaction. (*In re Kahlen W., supra,* 233 Cal.App.3d at p. 1425.)

[5] For purpose of the ICWA, an "Indian child" is an unmarried person under age 18 who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4).) The ICWA applies regardless of whether the child is registered or enrolled with the tribe or is merely eligible to be. (*In re Desiree F., supra,* 83 Cal.App.4th at p. 471.)

also reported that she telephoned "the appropriate worker at the Cherokee Nation" and gave her notice of the juvenile court proceedings on September 6, 2000.[6] This information was repeated to the juvenile court in the department's reports before the jurisdictional hearing, the dispositional hearing, the six-month review hearing and the 12-month review hearing. After 15 months, the department had received no confirmation of tribal membership.[7]

Brian argues that this recitation is not sufficient—that the department must provide the juvenile court with a copy of the notice sent evidencing its compliance with ICWA.[8] In one case, the Fifth Appellate District has concluded that the department fails to establish that it gave the required ICWA notice unless (1) it provides the juvenile court with a copy of the notice sent; (2) that notice took the form of a completed preprinted SOC 319 form promulgated by the state Health and Welfare Agency; and (3) the notice was mailed to the statutorily prescribed recipients by registered mail with return receipt requested. (See *In re H. A.* (2002) 103 Cal.App.4th 1206, 1211-1213.) Because the department did not provide a copy of this form to the juvenile court, the matter was remanded for a limited hearing to resolve the question of whether proper notice was given and whether the children were Indian children within the meaning of the ICWA. (See *id.* at p. 1215.)

We disagree with this approach, which relies on nonbinding guidelines intended to aid state agencies to comply with federal law and elevates their violation to the level of noncompliance with the ICWA itself. (See *In re Kahlen W., supra,*

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[6] This telephone call did not satisfy the ICWA's notice requirements. (See *In re Marinna J., supra,* 90 Cal.App.4th at p. 735; *In re Kahlen W., supra,* 233 Cal.App.3d at p. 1422.)

[7] A representative of the Sonoma County Indian Health Project also stated that Carlisa was identified as non-Indian and thus not eligible for support services, although she and Angela could obtain medical care there as Medi-Cal recipients.

[8] County counsel acknowledges that copies of the September 2000 notices were not filed with the juvenile court.

233 Cal.App.3d at p. 1422 fn. 3; see also *In re L. B.* (2003) 110 Cal.App.4th 1420, 1425-1426 [California has not adopted these advisory guidelines].) The ICWA requires the department to give notice in a certain manner to specified entities; it does not specify that the department must provide proof of that notice to the juvenile court in order for the notice to be deemed valid. (See *In re L. B., supra,* 110 Cal.App.4th at pp. 1425-1426; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195-199 [rejecting claim that ICWA requires proof of notice].) When the department reports that ICWA notice has been provided, we may properly presume that this notice complied with the requirements of the ICWA. (*In re L. B., supra,* 110 Cal.App.4th at p. 1425; *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108; see *In re Levi U., supra,* 78 Cal.App.4th at pp. 195-199 [rejecting claim that conclusory statement in department report was insufficient basis on which to conclude that notice was sent]; see also Evid. Code, §§ 660, 664 [rebuttable presumption that official duty was regularly performed].) The report indicates that two types of "notice" was given—one "sent" to the tribes and the BIA and one telephoned to a tribal worker. We may presume that the "sent" notice was the actual written notice provided for by law which complied with the specific terms of the ICWA. (See *In re Jeffrey A., supra,* 103 Cal.App.4th at p. 1108 [refusing to presume that nondescript "request for verification" constituted ICWA notice].) As Brian offers no evidence to rebut this presumption, he has not met his burden of proof and we may infer that the notice sent complied with the requirements of the ICWA.

Brian also contends that the department's report fails to indicate that it notified all three federally recognized Cherokee Tribes that are entitled to notice. The ICWA requires that notice be given to "the Indian child's tribe." (25 U.S.C. § 1912(a).) State regulations implementing the ICWA require that the notice be sent to "all tribes" of which the child may be a member or eligible to be a member. (Cal. Rules of Court, rule 1439(f)(3).) The United States recognizes the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians of North Carolina, and the United Keetoowah Band of Cherokee Indians of Oklahoma as Cherokee entities. (See *In re*

L. B., supra, 110 Cal.App.4th at p. 1424.) In this matter, the department reported that it notified "the Cherokee Tribes." When it terminated Brian's parental rights, the juvenile court concluded that notice had been given as required by law.

Considering these facts and the rebuttable presumption that official duties are performed, we infer that the department sent notice to all Cherokee Tribes that were entitled to receive it. (See Evid. Code, §§ 660, 664.) As Brian offers nothing more than speculation that this notice was not given to all tribes entitled to be notified pursuant to the ICWA, we conclude that he has not met his burden of proof to rebut the presumption that the department did as it was required to do.

2. *By Juvenile Court*

Brian also contends that the juvenile court failed to consider the ICWA, failed to find that the department had complied with its notice provisions, and failed to apply the ICWA until the tribes or the BIA determined that Angela was not an Indian child. The juvenile court has a sua sponte duty to ensure that the department complies with the notice requirements. (*Dwayne P. v. Superior Court, supra,* 103 Cal.App.4th at p. 261.) There is no evidence that the juvenile court ever considered any ICWA issue, other than to read the reports that the department made on this matter. When the juvenile court fails to make an explicit or implicit determination whether the ICWA applies, then it errs. (*In re Antoinette S., supra,* 104 Cal.App.4th at p. 1413.) In this matter, it appears that the juvenile court may have erred by failing to consider the ICWA in order to ensure that its notice requirements were met.

Assuming arguendo that the juvenile court erred, we must consider whether any error was prejudicial. The failure to give proper notice deprives the juvenile court of jurisdiction to proceed in its dependency matter. Thus, it constitutes prejudicial error requiring reversal and remand. (*In re Samuel P., supra,* 99 Cal.App.4th at p. 1267.) However, we have concluded that the department sent the required notice, so any juvenile court failure to inquire about notice was necessarily harmless. (See pt. II.C.1., *ante*.)

A second ground of harmlessness exists in this matter. Failure to comply with the ICWA's notice requirements constitutes prejudicial error only if there is reason to believe that the dependent child may be an Indian child. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 850; *In re Marinna J., supra,* 90 Cal.App.4th at p. 736.) The tribe makes this determination. (See *In re Desiree F., supra,* 83 Cal.App.4th at p. 470; see also Cal. Rules of Court, rule 1439(g)(1).) The department's notice elicited no claim from the tribes or the BIA that Angela is an Indian child within the meaning of the ICWA. This lack of response has been held to be tantamount to a determination that she was not an Indian child unless the department or the juvenile court receives further information on this issue. (See, e.g., *In re Levi U., supra,* 78 Cal.App.4th at p. 198.) Thus, as it appears that the tribe has impliedly concluded that Angela is not an Indian child within the meaning of the ICWA, we are satisfied that any juvenile court failure to consider that federal statute was harmless under the circumstances of this case.[9]

The juvenile court order is affirmed.

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Reardon, J.

We concur:

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Kay, P.J.

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Sepulveda, J.

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[9] In light of this conclusion, we need not address Brian's additional claim of error that the department failed to notify the tribes and BIA of any hearings after the jurisdictional hearing. (See *In re Levi U., supra,* 78 Cal.App.4th at pp. 198-199 [once tribe impliedly concludes that child is not an Indian child by its lack of response to notice, department and juvenile court have no further obligations under ICWA].)